

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

FRANCIS SCHERVIER CHILDCARE
& LEARNING CENTER
Employer

- and -

Case No. 2-RC-22187

NEW YORK'S HEALTH & HUMAN
SERVICE UNION, 1199, SEIU, AFL-CIO
Petitioner

DECISION AND DIRECTION OF ELECTIONS

Upon a petition filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Rita C. Lisko, a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2.

Upon the entire record in this proceeding¹, it is found that:

1. The Hearing Officer's rulings are free from prejudicial error and are hereby affirmed.²

2. The parties stipulated that Francis Schervier Childcare & Learning Center (the "Employer"), with an office and principal place of business at 2975 Independence Avenue, Bronx, New York, is an education corporation pursuant to a provisional charter from the University of the State of New York Education Department. The Employer operates a Childcare & Learning Center which is licensed by the City of New York, Department of Health. During the past twelve months, the Employer has received gross

¹ The brief filed by Counsel to the Employer has been carefully considered. Counsel for the Petitioner has not filed a brief.

² The Employer has raised an issue regarding the Hearing Officer's ruling regarding the amendment of the petition by Petitioner. This issue is more fully discussed below.

revenues in excess of \$250,000 and has purchased and received materials, goods and services valued in excess of \$5,000 directly from entities located outside the State of New York. Based upon the stipulation of the parties and the record, I find that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated and I find that New York's Health & Human Service Union, 1199, SEIU, AFL-CIO (the "Petitioner" or the "Union"), is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

5. The Petitioner seeks to represent a unit comprised of all full-time and regular part-time, including per diem, employees, including teachers, acting teachers, assistant teachers, educational aides and clerk typists, employed by the employer, and excluding all other employees, guards and supervisors³ as defined by the Act. The Employer does not dispute the appropriateness of the unit.⁴

However, the Employer objects that the Hearing Officer granted Petitioner's request to amend the petition. On February 3, 2000, at the first day of hearing, Petitioner amended the petition to change the name of the employing entity identified on the petition from Frances Schervier Nursing Care Center to Frances Schervier Childcare & Learning Center. The Employer contends that it has been denied its due process rights because the amended petition names a different and distinct employing entity from that named in Petitioner's original petition. In particular, the Employer maintains that, when it received the Notice of Hearing in this case, it believed that the representation issues concerned

³ The parties have stipulated that the Director of the Childcare & Learning Center is a supervisor and shall be excluded from the appropriate unit.

only Frances Schervier Nursing Care Center. The Employer therefore asserts that it was not adequately notified of, and therefore could not adequately prepare for, the representation issues pertaining to Frances Schervier Childcare & Learning Center. The Employer has moved to dismiss the amended petition and to require Petitioner to file a new petition naming Frances Schervier Childcare & Learning Center as the employing entity.

It appears that the Hearing Officer properly granted the amendment to the petition. The Employer merely asserted that it had been harmed by the amendment to the petition without presenting evidence of any specific harm. The petition as initially filed included specifically employees employed by and in both Frances Schervier Nursing Care Center and Frances Schervier Childcare & Learning Center.⁵ Therefore, based on the petition as filed, the Employer was fully on notice that the Union sought to represent those classifications employed exclusively in the Child Care & Learning Center. The effect of the amended petition was merely a clarification of the identity of the employing entity of those classifications of employees the Petitioner was still seeking to represent. Further, I note that the amendment resulted in a decrease in size of the proposed unit and did not seek to include additional classifications not previously sought. Thus there has not been a substantial and material change to the nature of the petition. In *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1000, n. 12 (1958), the Board, in a contract bar setting, held that there had been no prejudice in relating the filing date of an amended petition back to the original petition if “the employees involved were contemplated by or identified with reasonable accuracy in the original petition, or the amendment does not substantially

⁴ The parties have stipulated that the unit includes two categories of professional employees: teachers and acting teachers. The remainder of the unit are nonprofessionals.

⁵ The original Petition covered a unit including “All full-time and regular part-time, including per diem, nonprofessional employees, including assistant teachers, care givers, teacher’s aides, physical therapy assistants, COTAs, clerk-typists, X-Ray coordinators, recreational therapists, pharmacy assistants, switchboard operators, sacristans, purchasing clerks, entitlement coordinators, secretaries, medical records clerks and other clerical employees.”

enlarge the character or size of the unit or the number of employees covered.” Such is the situation here.

Furthermore, Employer’s counsel appeared at the hearing on behalf of both the Nursing Care Center and the Childcare & Learning Center. When the hearing opened on February 3, and after Petitioner had amended the employing entity's name on its petition, the Employer's counsel stipulated to the composition of the unit. Moreover, the hearing was re-opened nearly three weeks after it had initially closed. This three-week period provided the Employer a meaningful opportunity to consider any of the issues that it believed had been raised by the amended petition, but none were raised. Based upon all of the above, it appears that it was appropriate to proceed with the processing of the amended petition.

Based on all of the foregoing and the stipulation of the parties, I find that the petitioned-for units are appropriate.

Accordingly, I direct an election in the following units that are appropriate for the purposes of collective bargaining:

UNIT A (Professional Unit)

Included: all full-time and regular part-time teachers and acting teachers, including per diems, employed by the Employer at 2975 Independence Avenue, Bronx, New York.

Excluded: all non-professional employees set forth in Unit B, and all other employees, and guards and supervisors as defined in the Act.

UNIT B (Non-Professional Unit)

Included: all full-time and regular part-time, assistant teachers, including per diems, educational aides and clerk typists, employed by the Employer at 2975 Independence Avenue, Bronx, New York.

Excluded: the Director of the Childcare & Learning Center, and all guards, professional employees and supervisors and confidential employees as defined in the Act.

DIRECTION OF ELECTIONS

Elections by secret ballot shall be conducted by the Regional Director, Region 2, among the employees in the units found appropriate at the time and place set forth in the notices of election to be issued subsequently, subject to the Board's Rules and Regulations.⁶ Eligible to vote are those in the units who were employed during the payroll period ending immediately preceding the date of the Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are in the units may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.⁷ Those eligible shall vote whether they desire to be represented for collective bargaining

⁶ Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer "at least 3 full working days prior to 12:01 a.m. of the day of the election." Section 103.20(a) of the Board's Rules. In addition, please be advised that the Board has held that Section 103.20 (c) of the Board's Rules requires that the Employer notify the Regional Office at least five full working days prior to 12:01 a.m. of the day of the election, if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB No. 52 (1995).

purposes by New York's Health & Human Service Union, 1199, SEIU, AFL-CIO.⁸ Those employees who are in Unit A (Professional Unit) will be asked two questions on the ballot:

1. Do you desire to be included with the nonprofessional employees in Unit B in a single unit for the purposes of collective bargaining? To which the choice of answers will be "Yes" or "No."

2. Do you wish to be represented for collective bargaining purposes by New York's Health & Human Service Union, 1199, SEIU, AFL-CIO?

Dated at New York, New York
March 7, 2000

(s) *Daniel Silverman*

Daniel Silverman
Regional Director, Region 2
National Labor Relations Board
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Code: 347-4020-6750-8300-393-6024

⁷ In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *North Macon Health Care Facility*, 315 NLRB No. 50 (1994); *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven days of the date of this Decision, 3 copies of an election eligibility list, containing the full names and addresses of all eligible voters, shall be filed by the Employer with the Regional Director, Region 2, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office at the address below, on or before **March 14, 2000**. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list, except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

⁸ Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 Fourteenth Street, NW, Washington, D.C. 20570-0001. This request must be received by the Board in Washington by no later than **March 21, 2000**.